RECORD AND BRIEFS

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In The
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICI CURIAE* BILLY GRAHAM EVANGELISTIC ASSOCIATION, CHRISTIAN CARE MINISTRY, ECO: A COVENANT ORDER OF PRESBYTERIANS, FOCUS ON THE FAMILY, KANAKUK MINISTRIES, PINE COVE, SAMARITAN'S PURSE, THE CHRISTIAN & MISSIONARY ALLIANCE, THE NAVIGATORS, THE ORCHARD FOUNDATION, TYNDALE HOUSE PUBLISHERS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AND ASSOCIATION OF GOSPEL RESCUE MISSIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici comprise a diverse group of religious ministry organizations. Collectively, they conduct many different types of activities including social services, community development, education, health care, family services, recreation, financial services, congregational care, foreign missions and publishing of works on theology and Christian living. Many *amici* sell goods or services to the public, some of which are comparable to secular goods and services. However, *amici* conduct all of their activities in furtherance of their respective Christian missions and in a manner that distinctly expresses and exercises their religious convictions. In doing so, they operate under a variety of legal structures, including for-profit business entities. Additional information about each of the *amici* is provided in the Appendix.

The Colorado statutory definition of "place of public accommodation" at issue in this case is extremely broad and does not distinguish between for-profit and nonprofit organizations. In addition, the law requires places of public accommodation to be open to all, not just with respect to sexual orientation, but also

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

regardless of distinctions based on religion.[2] As public accommodation legislation expands in scope, *amici* increasingly rely on religious exemptions to conduct their activities in a manner consistent with their distinct religious convictions.

The Colorado statute exempts from the term "public accommodation" places that are "principally used for religious purposes." But if the small business in this case, which is operated in accordance with its owner's religious beliefs, does not qualify for this exemption because its activities are not sufficiently religious, then some of *amici's* ministry activities also might not qualify for the religious exemption. Moreover, if free exercise and free speech rights do not protect the religious exercise and expression in this case, then these rights likely will not protect *amici* from public accommodation laws that burden their religious exercise.

More generally, this Court's analysis for this case will support a framework for religious exemptions in other areas of the law (many of which use language very similar to the religious exemption at issue in this case). A narrow construction of the religious exemption language, combined with a weak interpretation of free exercise rights, would significantly limit the right of ministry organizations like *amici* to conduct their activities and to use their facilities in accordance with their beliefs. Such a construction would also

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[2] Not all *amici* agree with the specific religious beliefs and actions challenged in this case. But *amici* do agree that these beliefs and actions are entitled to religious exercise protection.

undermine this country's defining commitment to religious liberty.

Therefore, *amici* urge this Court to hold that the public accommodation law (including the religious exemption) as interpreted and applied in this case violates Constitutional principles of religious deference and neutrality. These principles dictate broad construction of religious exemptions, narrow construction of the "neutral and generally applicable" requirement for laws that are not subject to strict scrutiny, and rigorous standards of strict scrutiny for laws that substantially burden religious exercise.

SUMMARY OF ARGUMENT

This case asks whether Masterpiece Cakeshop ("Masterpiece"), an owner-operated business, must create cakes that celebrate same-sex marriages, even though creating such cakes is contrary to the Christian beliefs by which the owner (Mr. Phillips) operates his business.

Mr. Phillips believes that God created marriage as a union between one man and one woman, and that God does not permit him to create a cake that celebrates same-sex marriage. Pet. App. 274a-77a. Similarly, Mr. Phillips believes that God does not permit him to create cakes that celebrate Halloween because he believes that to be a day that condones witchcraft. Pet. App. 283a.

When a same-sex couple requested that Masterpiece create a cake for their wedding celebration, Mr. Phillips politely declined to do so. Pet. App. 287a. The couple reported Masterpiece to the Colorado Civil Rights Commission (the "Commission"), arguing that Masterpiece unlawfully discriminated against them based on their sexual orientation.

Colorado law prohibits places of public accommodation from discriminating based on sexual orientation (and on religion and other characteristics). The statute defines a place of public accommodation broadly to encompass virtually any place offering goods, services, or facilities to the public. The statute makes no distinction between for-profit and nonprofit entities. However, the definition excludes any place if it is "a church, synagogue, mosque or other place that is principally used for religious purposes." C.R.S. § 24-34-601(1).

Notwithstanding this exclusion of places principally used for religious purposes (the "religious exemption"), the Commission classified Masterpiece as a place of public accommodation. The Commission then held that Mr. Phillips' decision not to create the same-sex wedding cake effectively discriminated against the couple based on their sexual orientation because weddings are closely intertwined with sexual orientation. The Colorado Court of Appeals agreed with this conclusion and also held that the application of this law to Masterpiece did not violate Masterpiece's rights under the Free Speech and Free Exercise clauses of the U.S. Constitution. *Masterpiece Cakeshop, Inc. v. Colorado*

Civil Rights Commission, 370 P.3d 272 (Colo. Ct. App. 2015).

The classification of Masterpiece as a place of public accommodation necessarily means that the Commission did not think that Masterpiece qualifies for the religious exemption. But the record reflects that Mr. Phillips operates Masterpiece to honor God in accordance with his religious beliefs. Pet. App. 274a-82a. Moreover, the religious exemption covers other places engaged in activities similar to secular and commercial activities. Therefore, the Commission has implicitly interpreted the religious exemption to require not only that Masterpiece be principally used for its owner's religious purposes, but also that Masterpiece's activities be sufficiently religious.

Such a "religiosity" test has been rejected as a test for religious exemptions by both Colorado and federal courts (and the Colorado General Assembly). Courts have consistently held that such a test violates Constitutional principles of religious deference and neutrality. The courts have held that government officials have no competence or authority to measure the religiosity of an organization's activities based on some litmus test of perceived religious content, and that using such a test invariably favors orthodox religious activities (such as church schools) over less conventional religious activities.

In evaluating a free exercise challenge to such a law, this Court has adopted the rule that "a law that is neutral and of general applicability need not be

justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (*citing Employment Division v. Smith*, 494 U.S. 872 (1990)). However, "[a] law *failing to satisfy these requirements* must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32 (emphasis added).

The Colorado public accommodation law, as applied in this case, substantially burdens the religious exercise of Masterpiece because it requires Masterpiece to engage in an activity that violates Masterpiece's religious beliefs. Further, the implicit religiosity test applied in this case manifestly fails both the religious neutrality and the general applicability tests. The neutrality and general applicability tests ensure that no interest receives favorable treatment over the interests of religious exercise, and these tests are meant to protect all religious exercise, not just that of more orthodox (or politically powerful) religious persons.

Finally, applying the public accommodation law to Masterpiece in this situation is not narrowly tailored to further a compelling governmental interest. The addition of sexual orientation as a protected characteristic may reflect the position of the State of Colorado (the "State") that protecting persons with this characteristic is an important interest in general. But the strict scrutiny test requires the State to establish that at the time of this case it had a compelling interest in

requiring Masterpiece (as a public accommodation) to create a cake celebrating a same-sex wedding. In addition, the State must establish that declining to apply this requirement to Masterpiece imposes meaningful harm on the compelling interest.

Rigorous strict scrutiny prohibits mere speculation on these points. And the State simply cannot meet its burden given that (i) at the time of this case the State itself would not issue a license for a same-sex marriage, and (ii) the public accommodation law already exempts other places principally used for religious purposes, regardless of whether such places have a religious objection to serving a same-sex wedding.

ARGUMENT

Religious liberty in this country reflects, among other things, the twin propositions (1) duty to God transcends duty to society and (2) true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments*:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id., *reprinted in Everson v. Board of Education of Ewing*, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.).

Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . ." Va. Code Ann. § 57-1 (West 2003). Because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. Put differently, civil government is not the highest authority in human affairs.

Building on these propositions, this Court has held that persons may exercise their religious beliefs in the marketplace, and that governmental inquiries into the religiosity of an activity or organization exceed the authority of government officials and invariably result in religious favoritism. Further, any law that substantially burdens religious exercise and is not religiously neutral and generally applicable must satisfy this Court's rigorous strict scrutiny standards.

As applied in this case, Colorado's public accommodation law substantially burdens religious exercise because it requires Masterpiece to act in violation of its religious beliefs. Also, the Commission's interpretation and application of the law is subject to strict

scrutiny because it is neither religiously neutral nor generally applicable. Finally, the law's application to Masterpiece fails strict scrutiny because it is not narrowly tailored to further a compelling governmental interest.

I. The statutory religious exemption as applied in this case effectively imposes a "religiosity" test that violates Constitutional principles of religious deference and neutrality.

A. The implicit conclusion that Masterpiece does not qualify for the religious exemption rests on the perception that Masterpiece's activities are not sufficiently religious.

Mr. Phillips owns and operates Masterpiece to honor God in accordance with his religious beliefs. Pet. App. 274a-82a. As such, Mr. Phillips believes that God does not permit him to create cakes promoting activities or messages that are (according Mr. Phillips' beliefs) contrary to God's law. *Id.* For this reason, because Mr. Phillips believes that Halloween is a celebration of witches and demons that God does not permit, Masterpiece does not create cakes that celebrate Halloween. Pet. App. 283a-84a. Similarly, because Mr. Phillips believes that God designed marriage solely as the union of one man and one woman, Masterpiece does not create cakes that celebrate same-sex marriages. Pet. App. 284a-85a.

Given these facts, Masterpiece straightforwardly qualifies for the religious exemption because it is a place that is principally used for Mr. Phillips' religious purposes. But the Commission classifies Masterpiece as a place of public accommodation, and therefore the Commission has, at least implicitly, determined that Masterpiece does not qualify for the religious exemption.

The Commission provides no analysis of the religious exemption, instead asserting (incorrectly) that Masterpiece's status as a public accommodation is an undisputed fact. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, 370 P.3d 272, 277 (Colo. Ct. App. 2015).[3] Masterpiece agreed only that it is a business that designs custom wedding cakes and other works for the public. Pet. App. 274a, 282a. But this fact is fully consistent with Mr. Phillips' operation of Masterpiece to honor God in accordance with his religious beliefs. Whether all of the facts collectively establish that Masterpiece is *not* a place that is principally used for religious purposes depends on how the religious exemption is interpreted.

The Commission infers its classification of Masterpiece as a place of public accommodation directly from the fact that Masterpiece creates and sells cakes and other works to the public. But this classification cannot

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[3] To the contrary, Masterpiece's legal status as a public accommodation is a legal conclusion. In any event, *amici* make the point in this brief that the public accommodation law, as applied to Masterpiece, violates the Free Exercise clause.

be based merely on the fact that Masterpiece's activities are similar to secular activities and are commercial in nature; many other activities, such as church schools and camps, qualify for the religious exemption if they further religious purposes, even though they have some secular and commercial characteristics. Indeed, there would be no need for a religious exemption if it didn't apply to secular or commercial activities otherwise covered by the public accommodation definition.

In addition, the classification cannot be based on the fact that Masterpiece is organized as a for-profit entity. Neither the religious exemption language nor the broader statutory definition of a place of public accommodation makes any distinction between for-profit and nonprofit organizations. As such, many nonprofit organizations are places of public accommodation. If Masterpiece conducted the exact same business through a nonprofit organization, the Commission would still hold that it is a public accommodation. On the other hand, there is no statutory basis to assert that a church school, for instance, should not qualify for the religious exemption if it is organized as a for-profit entity.

Therefore, the Commission's religious exemption interpretation turns not on whether Mr. Phillips operates Masterpiece to further religious purposes (he clearly does), but rather on the perception that designing and creating cakes is not a sufficiently religious activity. Put differently, the Commission interprets the requirement that a place be principally used for religious purposes to include a requirement that the

activities conducted at the place be sufficiently religious in nature.

Under this interpretation, a school teaching secular subjects from a religious perspective in furtherance of the beliefs of a church may be exempt, but a shop selling cakes to honor God in accordance with the religious beliefs of its owner would not be exempt. The difference lies not in whether the respective activities are furthering religious purposes (they both are), or in whether they are similar to secular, commercial activities (again, they both are), or whether they are conducted through a for-profit or nonprofit organization. Instead, the difference lies in the perception that one type of activity – education – can be a religious activity whereas the other type of activity – preparing baked goods – is simply not religious enough.

B. Both this Court and the Colorado Supreme Court have held that a "religiosity" test violates Constitutional principles of religious deference and neutrality.

Versions of a "religiosity" test find some support in decisions of this Court and the Colorado Supreme Court (following this Court's lead) from the 1970s through the early 1990s. However, both this Court and the Colorado Supreme Court (and other courts) have in more recent decisions consistently held that this test violates Constitutional principles of religious deference and neutrality.

1. Religious deference under Colorado law.

In 1977, the Colorado General Assembly adopted a statutory distinction between "pervasively sectarian" schools and other less religious schools for purposes of a student aid program. Based on this Court's guidance, the statute set forth certain measures of religiosity to use in determining whether an organization is "pervasively sectarian." *See, e.g., Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) ("no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones."). In 1982, the Colorado Supreme Court upheld this statutory provision, describing it as "an attempt to conform to First Amendment doctrine." *Americans United for Separation of Church & State Fund v. Colorado*, 648 P.2d 1072, 1075 (Colo. 1982).

Along these same lines, the Colorado Supreme Court in 1994 held that a statutory exemption from unemployment insurance for services "operated primarily for religious purposes," C.R.S. § 8-70-140(1), did not apply to "essentially secular services," even if such services were conducted in furtherance of an organization's religious purposes. *Samaritan Institute v. Tina L. Prince-Walker*, 883 P.2d 38 (Colo. 1994). The court further held that pastoral counseling services provided by a religious organization were not religious activities because they didn't include sufficient distinctly religious content. The court stated that the motivation for such services, to build upon a person's faith, was not relevant. As a result, the court concluded that because

the services were "essentially secular," the organization was not "operated primarily for religious purposes." *Id.*

But even prior to *Samaritan Institute*, the Colorado Supreme Court had begun to recognize the Constitutional difficulties in assessing the inherent religiosity (or lack thereof) in various activities. A long line of Colorado cases had already held that the state's property tax exemption for "religious worship" should be broadly construed in deference to the bona fide representations of religious organizations. *See, e.g., McGlone v. First Baptist Church of Denver*, 97 Colo. 427, 430-31 (1935) (holding that property tax exemptions for religious worship are subject to a "liberal rule of construction").

In 1989, the court applied this liberal rule of construction to affirm that a camp property owned and operated by Young Life was used exclusively for "religious worship." *Maurer v. Young Life*, 779 P.2d 1317 (Colo. 1989). The Young Life properties included "a Christian family lodge" with a "warm Christian atmosphere." *Id.* at 1329. Activities at the camps included horseback riding, archery, billiards, swimming, and jeep rides, and they were promoted, as in one instance, as "Sun and Fun" family vacations. *Id.* at 1341 (Mullarkey, J., dissenting).

The court noted that "'not all of the activities that take place at Young Life camps . . . are inherently religious, [however] they are used by Young Life as effective vehicles for presenting the gospel during the day

and for building relationships so that campers will be more receptive to the gospel as it is presented during the course of Young Life's program.'" *Id.* at 1331. The court cited the testimony of Young Life's president that:

> To us, skiing, horseback riding, swimming, opportunities to be with young people in a setting and in an activity that is wholesome is all a part of the expression of God in worship. There is no ["]we are now doing something secular, we are now doing something spiritual.["]

Id. at 1328.

Based on these findings, the court concluded that because "the uses of the properties were to advance in an informal and often indirect manner Young Life's purposes, . . . any nonreligious aspects of these activities were necessarily incidental" to such purposes. *Id.* Put differently, the court held that religious worship may encompass "secular" activities conducted in furtherance of religious purposes. In so doing, the court observed that "[a]voiding a narrow construction of property tax exemptions based upon religious use also serves the important purpose of avoiding any detailed governmental inquiry into or resultant endorsement of religion that would be prohibited by the establishment clause of the first amendment of the United States Constitution." *Id.* at 1333 n.21.

In connection with the *Maurer* case, and also in 1989, the Colorado General Assembly revised the

statute so that it exempted "[p]roperty, real and personal, which is owned and used solely and exclusively for religious purposes. . . ." C.R.S. § 39-3-106(1). To guide the application of this exemption, the General Assembly adopted legislative findings and declarations that, among other things:

> The constitutional guarantees regarding establishment of religion and the free exercise of religion prevent public officials from inquiring as to whether particular activities of religious organizations constitute religious worship; many activities of religious organizations are in furtherance of the religious purposes of such organizations; such religious activities are an integral part of the religious worship of religious organizations; and activities of religious organizations which are in furtherance of their religious purposes constitute religious worship.

C.R.S. § 39-3-106(2).

During this same period, in a series of cases starting in the 1980s and progressing through the early 2000s, this Court effectively rejected the "pervasively sectarian" test. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 840 (O'Connor, J., concurring); *see also id.* at 793 (plurality) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs"). Following this Court's lead, the Tenth Circuit Court of Appeals in 2008 held that the Colorado statutory distinction between "pervasively sectarian" and other religious

schools violated Constitutional principles of religious deference and neutrality. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

The Tenth Circuit observed that the statutory test "expressly discriminates *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions, and it does so on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice." *Id.* at 1256. The court concluded the test criteria were inconsistent with this Court's decisions precluding states from distinguishing among religious activity "on the basis of intrusive judgments regarding contested questions of religious beliefs or practice." *Id.* at 1261; *see also id.* at 1263 (the "First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes.").

Just the next year, the Colorado Supreme Court considered whether the operation by a Catholic organization of a continuing care retirement center constituted a "religious activity" for purposes of a city sales tax exemption. *Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812, 823 (Colo. 2009). The court found the trial court's reasoning, distinguishing between "religious functions" such as a chapel and "secular functions" such as refrigerators, "to be representative of an order that would violate the Establishment Clause." *Id.* at 823 (*citing Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). Further, the

court discussed *Mauer* "as an example of courts adopting a broad view of religious activity in an attempt to avoid entanglement. . . ." *Id.* at 819 n.5.

Finally, the Colorado Court of Appeals has rejected a "religiosity" test in two more recent decisions. In 2015, the court declined to apply the "essentially secular services" test to the same statutory exemption applied in *Samaritan Institute. A Child's Touch v. Industrial Claims Appeals Office*, 2015 Colo. App. 182, 2015 Colo. App. LEXIS 2038 (December 31, 2015). Instead, the court held that a religious school was operated primarily for religious purposes even though its curriculum was primarily secular. The court quoted with approval from an Illinois case involving a religious school, which stated that "[t]he Department's conclusion was based on a finding that [the school's] 'curriculum is primarily secular in nature.' Well, of course it is. Just like the curricula in every other parochial school in the state. But the primary purpose of the school is to teach those secular subjects in a faith-based environment." *Id.* at *8 n.2 (citation omitted).

In 2016, the Colorado Court of Appeals held that two YMCA camp and conference centers that offer to the public a wide range of recreational activities in a Christian environment are used solely for religious purposes under the statutory religious property tax exemption. *Grand County Board of Commissioners v. Colorado Property Tax Administrator*, 2016 Colo. App. 2, 2016 Colo. App. LEXIS 20 (January 14, 2016). The court rejected an argument that government officials should evaluate the "religiousness" of each activity,

noting that "[i]t is not our place to undertake an examination of Christian doctrine to determine whether hiking is 'overtly Christian' enough to count as a religious activity." *Id.* at ¶34. The same can be said in this case for preparing cakes.

2. Religious deference under other laws.

This Court has repeatedly held that government officials have no competence or Constitutional authority to interpret or apply religious beliefs, or to determine based on their own standards the religious significance of various activities. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), for example, this Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *Id.* at 132. This Court noted that the requirement would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added).

Ten years later, this Court upheld a statutory religious exemption that applied to all activities of a religious organization, not just its *religious activities*. *Corp. of Presiding Bishop v. Amos* 483 U.S. 327 (1987). This Court noted that "Congress' purpose in extending

the exemption was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" *Id.* at 336. Further, this Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.*

Religious deference applies not just to distinctions between religious and secular activities, but also to different types of religious activities. In *Widmar v. Vincent*, this Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." 454 U.S. 263, 269 n.6 (1981). This Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* Indeed, "[m]erely to draw the distinction would require the [State] – and ultimately the Courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute religious worship due to the many and various beliefs that constitute religion).

These same principles apply to the religious character of an organization. The Court of Appeals for the

D.C. Circuit struck down a "substantial religious character" test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In evaluating a religious school, for instance, the test required the NLRB to consider "such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id.* (quotation omitted). The court held that the "very process of inquiry" into the "'religious mission' of the University," as well as "the Board's conclusions have implicated [] First Amendment concerns. . . ." *Id.* at 1341 (*citing NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)). The court concluded that the test was fatally flawed because it "boil[ed] down to '[I]s [an institution] sufficiently religious?'" *Id.* at 1343.

As recognized in these cases, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted

as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters.

3. Failure to apply religious deference invariably results in religious favoritism.

This Court and other courts have also found that, when government officials seek to determine the religious content in activities or policies, they effectively create an implicit state-defined orthodoxy regarding religious activities. Distinctions based on a court's view of the relative religious significance of various activities inevitably favor expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods.

In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in *Widmar*. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. This Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Fowler, 345 U.S. at 69-70.

Similarly, in *University of Great Falls*, the D.C. Circuit observed that:

> To limit the . . . exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.

Id. at 1346. *See also Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694, 711 (2012) (Thomas, J., concurring) ("[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'Mainstream' or unpalatable to some."); *id.* at 712 (Alito J., concurring)

("[b]ecause virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.").

In *Colorado Christian University*, the Tenth Circuit held that the "pervasively sectarian" test resulted not only in excessive entanglement, but also in religious favoritism. 534 F.3d 1257-60. The court observed that "[b]y giving scholarship money to students who attend sectarian – but not 'pervasively' sectarian – universities, Colorado necessarily and explicitly discriminates among religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials." *Id.* at 1258. The court further noted that "the discrimination is expressly based on *the degree of religiosity* of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board." *Id.* at 1259 (emphasis added).

In short, a religiosity test which requires government officials to determine whether an activity, policy, organization or place is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no competence or authority to navigate. Such a test will inevitably produce arbitrary and discriminatory results.

C. Constitutional principles of religious deference and neutrality extend religious exemptions to secular or commercial activities that further sincerely held religious purposes.

The problem with the religious exemption in the Colorado public accommodation law is not how it is worded in the statute (a "place that is principally used for religious purposes"), but rather how it has effectively been interpreted (a place that conducts sufficiently religious activities). Other statutory religious exemptions use very similar wording. For instance, federal law provides an exemption from unemployment insurance obligations for employers which are "operated primarily for religious purposes." 26 U.S.C. § 3309(b); *see also Widmar v. Vincent*, 454 U.S. at 271 n.9 (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech). Lastly, the Third Circuit determined that an organization qualified for the religious employer exemption under section 702 of Title VII because its "primary purpose was religious." *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 231 (3d Cir. 2007).

As noted, the key is how the religious exemption language is interpreted. In this regard, Constitutional principles of religious deference and neutrality dictate that, instead of measuring the "religiosity" of activities, government officials should apply the following two principles.

1. Religious beliefs must be sincerely held.

To determine whether an organization embraces its primary purpose(s) for religious reasons, government officials cannot (and need not) weigh the religious significance of various characteristics of the organization. But they can determine whether an organization's asserted religious beliefs and mission are merely a sham. In *U.S. v. Ballard*, 322 U.S. 78 (1944), this Court held that although courts cannot inquire into whether an individual's asserted religious beliefs are true, they can inquire into whether the individual honestly and in good faith actually holds such beliefs. Similarly, in *Hobby Lobby*, this Court noted that, under the applicable exemption, "a corporation's pre-textual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2774 n.28 (2014). This Court observed that Congress was confident of the ability of the federal courts to weed out insincere claims. *Id.* at 2774; *see also Hosanna-Tabor*, 132 S.Ct. at 711 (Thomas, J., concurring) (concluding that the plaintiff should be treated as a minister because the evidence demonstrated that the church sincerely considered her a minister).

Accordingly, government officials may inquire into whether an organization has consistently asserted a religious basis for its purposes or whether it is opportunistically asserting such a basis merely to claim an exemption. For instance, the court in *University of Great Falls* held that the religious character of an

organization may be determined by confirming that the organization holds itself out to the public as a religious organization. 278 F.3d at 1344. They may also determine whether the organization has taken distinctive action in accordance with such beliefs (such as choosing, in contrast with competitors, not to open for business on Sundays, or to prepare Halloween cakes).

There may be less reason to doubt that asserted religious beliefs are sincerely held when they support exclusively religious activities conducted by a nonprofit corporation in which no profits can be distributed to shareholders. And, indeed, if a for-profit entity consistently engages in activities contrary to its beliefs to increase the profits being distributed to its owner, a court might conclude that its purported beliefs are not sincerely held. But nothing about the "for-profit" structure of an entity or its commercial activities inherently precludes it from sincerely holding and exercising religious beliefs in connection with its activities.

2. Religious exemptions cannot be limited to exclusively religious purposes or activities.

In determining whether an organization is operated primarily for religious purposes, courts have consistently held that an organization's purposes or activities need not be exclusively religious. For example, in *University of Great Falls*, the court rejected the argument that a university did not qualify for a religious exemption because it promoted values similar to

those taught at secular institutions (*e.g.*, character, competence and community). The court observed that this fact:

> . . . says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes.* That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.

278 F.3d at 1346 (emphasis added).

Similarly, the Third Circuit in *Leboon* rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Leboon*, 503 F.3d at 230.

More recently, this Court unanimously held that a teacher qualified as a minister even though her primary duties consisted of teaching secular subjects. In rejecting the federal government's argument that the religious exemption at issue in the case should be

limited to employees engaged in "exclusively religious functions," the Court observed:

> Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

Hosanna-Tabor, 132 S.Ct. at 708-09. Similarly, this Court has held that a for-profit corporation may exercise religion through commercial activities. *Hobby Lobby*, 134 S.Ct. at 2771. In *Hobby Lobby*, this Court held that the company exercises religion because its "statement of purpose proclaims that the company is committed to . . . Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles." *Id.*

These cases affirm that purposes and activities are no less religious merely because some persons may embrace similar purposes or conduct similar activities for nonreligious reasons. Put differently, an organization's primary purpose is no less religious merely because it might be embraced by other organizations for secular reasons. To hold otherwise would mean that many organizations which believe as a matter of religious conviction that they are called to serve tangible human needs or even to engage in the commercial marketplace would be required to sacrifice their religious

character in order to fulfill their calling. Such a result trivializes religious exercise.

II. Colorado's public accommodation law as interpreted and applied in this case is subject to, and does not survive, this Court's rigorous strict scrutiny standards.

This country's commitment to religious liberty recognizes that, for many citizens, religious beliefs inform their most fundamental understandings of themselves and their purpose in life. As Justice Kennedy observed in the *Hobby Lobby* case:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult.

Hobby Lobby, 134 S.Ct. at 2785 (Kennedy, J., concurring).

Although the task may be difficult in some situations, this Court has developed a framework for evaluating religious exercise claims. In applying this framework, the principles of religious deference and neutrality dictate not only a broad understanding of religious exercise, but also a close evaluation of governmental interests. Accordingly, this Court has provided a deferential determination of how a law may burden religious exercise, a narrow interpretation of the neutral and generally applicable tests that identify laws not subject to strict scrutiny, and a rigorous application of strict scrutiny when triggered.

A. The law as interpreted and applied substantially burdens religious exercise.

By requiring Masterpiece to design a cake celebrating a same-sex marriage in direct violation of its firmly held religious convictions, the law substantially burdens its religious exercise. As this Court recognized in *Hobby Lobby*:

> the exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that operates so as to make the practice of . . . religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion.

Id. at 2770 (quotations and citation omitted). In addition, this Court has held that the mere fact that the burden is a condition on participation in the marketplace does not remove it from free exercise scrutiny. *Id.* at 2777.

Here, Colorado's public accommodation law does more than make the religious practice more expensive, it entirely bans the practice (except for organizations engaged in sufficiently religious activities). In this context, the law's religious exemption concedes that the law can substantially burden the religious exercise of those with religious objections to the law's requirements. Alleviating this burden is the sole reason for the exemption.

The Commission's implicit "religiosity" test also imposes a substantial burden on Masterpiece. As this Court noted in *Amos*, requiring an organization "to predict which of its activities a secular court will consider religious" imposes a significant burden and "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." 483 U.S. at 336.

Finally, this Court has rejected the notion that government officials can determine what actions are not permitted by a person's religious beliefs. In this case, Masterpiece's belief "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the

commission of an immoral act by another." *Hobby Lobby*, 134 S.Ct. at 2778. If a court were to second guess Masterpiece, it would be "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question. . . ." *Id.*

B. The law is neither neutral nor generally applicable.

Prior to this Court's decision in *Smith*, any law that substantially burdened religious exercise was subject to strict scrutiny. *Smith* held that such scrutiny does not apply to laws that are neutral and generally applicable. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). As a result, the scope of religious exercise rights now turns on whether the neutral and generally applicable requirement is defined broadly, such that it includes most laws, or narrowly, such that many laws do not satisfy it.

Those seeking to apply statutes to religious exercise naturally argue for a broad interpretation. They may argue that a law is generally applicable even if it includes exemptions, and that it is neutral unless it specifically targets religion.

However, these arguments ignore the rationale for the requirement. In assessing the general applicability of a law, the U.S. Supreme Court has stated that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Part of the rationale underlying this concern can be stated as follows:

> First, the legislature cannot place a higher value on some well-connected secular interest group with no particular constitutional claim than it places on the free exercise of religion. Second, . . . if burdensome laws must be applied to everyone, religious minorities will get substantial protection from the political process. . . . If a burdensome proposed law is generally applicable, other interest groups will oppose it, and it will not be enacted unless the benefits are sufficient to justify the costs. But this vicarious political protection breaks down very rapidly if the legislature is free to exempt any group that might have enough political power to prevent enactment, leaving a law applicable only to . . . groups too weak to prevent enactment.

Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 35-36 (2000) (footnotes omitted). *See also Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding that a ban on beards for police officers was not generally applicable since it provided an exception for medical purposes); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (holding that a university policy requiring all freshmen to live in on-campus dormitories was not generally applicable since it included exemptions for married students, older students, and students commuting from their parents' home as well as for reasons such as familial responsibility, medical need, or emotional difficulties).

This rationale applies not just to distinctions between secular and religious groups, but also to distinctions among religious groups or among types of religions (where orthodox or conventional religious exercise may implicitly receive preferential treatment). *See, e.g.*, *Hobby Lobby*, 134 S.Ct. at 2783 n.41. Of course, religious exemptions that distinguish based on non-religious factors (such as size, or even tax-exempt status) may be part of a neutral and generally applicable law. But the government cannot use religious exemptions to favor some types of religious activities over others based on their religiosity, and as discussed in Section I.B above, the Commission's implicit "religiosity" test leads precisely to this result. Therefore, Colorado's public accommodation law as interpreted and applied in this case is neither religiously neutral nor generally applicable.[4]

C. The State cannot establish that the law as interpreted and applied to Masterpiece is narrowly tailored to a compelling governmental interest.

Because the public accommodation law as interpreted and applied in this case is neither religiously neutral nor generally applicable, it is subject to strict scrutiny. And this Court has emphasized that the strict scrutiny test must be rigorous:

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[4] The assessment of the "religiosity" of distinct activities also constitutes a form of individualized exceptions that trigger strict scrutiny under *Smith*. 494 U.S. at 884.

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests.

Lukumi, 508 U.S. at 546 (citations omitted).

Strict scrutiny requires both an examination of the interests furthered by the public accommodation law and the impact on such interests from exempting Masterpiece. Those seeking to apply statutes to religious exercise will generally argue that any applicable legislative interest is compelling, and that declining to apply the law to the person whose free exercise it burdens will materially impair such interest. But it is important to note that these two arms push against each other, such that it is difficult to maintain that a law is narrowly tailored to a broadly stated interest. Accordingly, this Court has held that the test "requires us to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' – in other words, to look to the marginal interest in enforcing the [law] in th[is] case[]." *Hobby Lobby*, 134 S.Ct. at 2779 (citation omitted); *see also id.* at 2780.

Finally, the government cannot satisfy its strict scrutiny burden with mere speculation, but instead must present evidence to support its assertions. *Larson v. Valente*, 456 U.S. 228, 249 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 224-25 (1972); *Sherbert v. Verner*,

374 U.S. 398, 407 (1963); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995).

Often, courts will assume that the government's stated interest is compelling, even while noting reasons to doubt the government's position. *See Hobby Lobby*, 134 S.Ct. at 2779-80. In this case, the fact that the State has added sexual orientation as a protected class to the public accommodation law may (when combined with other evidence) support a finding that the State has an important interest in generally prohibiting sexual orientation discrimination. However, the added protection does not establish that, at the time of the actions challenged in this case, the interest as applied to the provision of services for same-sex weddings was compelling. This is particularly so given that, at the time, the State was itself discriminating on the basis of sexual orientation by not providing licenses for same-sex marriages. *Masterpiece*, 370 P.3d at 277.

Even assuming the interest was compelling at that time, the State has not established that declining to apply the law to Masterpiece would materially harm such interest. Indeed, the State cannot do so given that it exempts other places principally used for religious purposes, regardless of whether such places have religious objections to same-sex weddings.

CONCLUSION

Broad religious liberty protection not only enforces the inherent limits of civil government, but it also fosters religious diversity and invigorates the marketplace of ideas. As this Court observed in *Wisconsin v. Yoder*, " . . . in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'" 406 U.S. 205, 223-24 (1972).

This Court further noted that "[e]ven [] idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." *Id.* at 226. The same must be said of Masterpiece, regardless of whether one considers its actions to be wrong, or to be preserving the values of Western civilization, or to be idiosyncratic.

The Commission's interpretation of Colorado's public accommodation law sacrifices this commitment to religious liberty and the long-term benefits of religious diversity without any compelling justification. For these reasons, *amici* respectfully request this Court to hold that the public accommodation law as applied to Masterpiece substantially burdens religious

exercise, is neither neutral nor generally applicable, and does not survive strict scrutiny.

Respectfully submitted,

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APPENDIX

Descriptions of *Amici*

Billy Graham Evangelistic Association ("BGEA") was founded by Billy Graham in 1950 to proclaim the Gospel of Jesus Christ by every effective means and to equip others to do the same. BGEA ministers to people around the world through a variety of activities including festivals and celebrations, television and internet evangelism, and the Billy Graham Library. BGEA has over 850 employees and over 50,000 volunteers.

Christian Care Ministry ("CCM") is a nonprofit organization that helps Christians share their lives, faith, talents and resources. Among other programs, CCM operates Medi-share, which is a health care sharing ministry with more than 300,000 members who share each other's eligible medical bills and, most importantly, encourage and lift one another up in prayer.

ECO: A Covenant Order of Evangelical Presbyterians ("ECO") is a church denomination with over 350 member churches nationwide. ECO seeks to build flourishing churches that make disciples of Jesus Christ. ECO's four priorities are to lift up the centrality of the gospel, grow with an emerging generation of leaders, prioritize a wave of church innovation, and create an atmosphere of relational accountability.

Focus on the Family is a Christian ministry organization, headquartered in Colorado, committed to strengthening the family in the United States and abroad by providing help and resources that are grounded in biblical principles. As part of that mission, Focus on the Family educates and advocates for strong protections for our First Amendment rights. The president of Focus on the Family, Jim Daly, hosts the flagship Focus on the Family radio broadcast about family issues carried daily on 2,000 radio outlets in the United States and heard daily by 1.5 million North America listeners.

Kanakuk Ministries ("Kanakuk") is a Christian ministry organization that offers a wide range of Christian camping programs. Kanakuk's summer camp program is dedicated to developing dynamic Christian leaders through life-changing experiences, Godly relationships, and spiritual training. Since 1926, Kanakuk has been showing kids the joy of a relationship with Christ through excellence in non-denominational sports training, camping adventures, and Christian mentoring. In that time, Kanakuk has served over 300,000 youth.

Pine Cove is a Christian ministry organization that offers Christian camping programs and facilities year round in Texas and other states. Pine Cove serves children, youth, and families each summer, and provides outdoor education, retreats and conferences in other seasons, accommodating over 20,000 visitors each year. Pine Cove employs over 160 full-time and

part-time resident staff, and over 1,500 college-age staff work at the camps every summer.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ.

The Christian & Missionary Alliance is a church denomination and missionary organization with over 400,000 members in over 2,000 churches in all 50 states. In addition, there are over 800 missionaries in 58 nations supported by the organization. Based in Colorado Springs, the organization also sponsors a number of educational institutions and retirement centers around the country.

The Navigators is an international, Christian ministry established in 1933. The Navigators are characterized by an eagerness to introduce Jesus to those who don't know Him, a passion to see those who do know Jesus deepen their relationship with Him, and a commitment to training Jesus' followers to continue this nurturing process among the people they know. Based in Colorado Springs, the Navigator staff family – 4,600 strong – includes 70 nationalities.

The Orchard Foundation is a nonprofit organization that offers a wide range of gift planning tools to individuals, families, and ministry organizations who desire to make the most of their God-given resources to meet personal, family, and charitable objectives. The Orchard Foundation regularly manages donor advised funds, charitable gift annuities, charitable remainder trusts, endowment funds, and other types of funds and trusts.

Tyndale House Publishers was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing The Living Bible. Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation (NLT). Tyndale products include many *New York Times* best sellers, including the popular *Left Behind* fiction series by Tim LaHaye and Jerry B. Jenkins.

Association of Christian Schools International ("ACSI") is the largest association of Protestant schools in the world, having more than 5,000 member Christian schools in more than 100 nations. ACSI is based in Colorado Springs. Its mission is to enable Christian educators and schools worldwide to effectively prepare students for life.

Association of Gospel Rescue Missions ("AGRM") was founded in 1913 to proclaim the passion of Jesus toward hungry, homeless, abused, and addicted people, and to accelerate quality and effectiveness in some 300 member missions. AGRM-affiliated organizations annually provide upwards of 65 million

meals and 25 million nights of lodging to those who are the most desperate and destitute throughout North America. Every year, these missions also graduate approximately 20,000 people from addiction recovery programs, direct some 45,000 people to meaningful employment, and help about 35,000 people establish themselves in independent housing.